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No. _____

In The

Supreme Court of the United States

October Term, 1994

MYERS & ASSOCIATES, LTD., RICHARD J. MYERS, AND EDWARD D. GILHOOLY,

Petitioners,

v.

TRINITY INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal district court has specific jurisdiction over the Defendants in a lawsuit in which the Plaintiff accuses the Defendants of tortious acts which occurred outside the forum state and which are unrelated to a preexisting relationship between the Plaintiff and the Defendants.

2. Whether nonresident patent attorneys who represented a Texas client, at the direction of the Plaintiff's law firm, established minimum contacts with Texas sufficient to establish specific jurisdiction.

3. Whether the Fifth Circuit correctly concluded that the district court has specific jurisdiction over the Defendants.

LIST OF ALL PARTIES

The following are parties in this case:

Trinity Industries, Inc.

Myers & Associates, Ltd.

Richard J. Myers

Edward D. Gilhooly

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING THE WRIT 2

FACTUAL BACKGROUND 3

ARGUMENT 10

I. The Law Applicable to Personal Jurisdiction Over a Nonresident Defendant 10

II. "Minimum Contacts" Under the Due Process Analysis 11

III. "Minimum Contacts" In Cases Involving Claims Arising From the Attorney-Client Relationship 12

IV. The Fifth Circuit Erred in Concluding That the District Court Has Specific Jurisdiction Over the Myers Defendants 15

A. The Myers Defendants have not purposefully availed themselves of the benefits and protections of the laws of the State of Texas 15

1. The incidences of representation are not purposeful availment 16

2. Infrequent trips to the forum state is not purposeful availment 17

TABLE OF CONTENTS – Continued

Page

3. Admission *pro hac vice* is not purposeful availment 17

4. When performance of legal services occurs outside the forum state, this performance is not purposeful availment 19

5. An out-of-state attorney-client relationship is not purposeful availment..... 20

B. The alleged injury to Trinity occurred, if at all, outside the State of Texas..... 20

IV. The Exercise of Personal Jurisdiction Over the Myers Defendants Would "Offend Traditional Notions of Fair Play and Substantial Justice" ... 23

CONCLUSION 25

APPENDICES.....App. 1

Opinion of the Fifth Circuit.....App. 1

Opinion of the Fifth Circuit on Petition for Rehearing..... App. 8

Order Granting Defendants' Motion to Dismiss, United States District Court.....App. 9

Final Judgment, United States District Court.....App. 14

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987) 11, 21

Austad Co. v. Pennie & Edmonds, 823 F.2d 223 (8th Cir. 1987) 13, 14, 15, 16, 17

Barnes v. Gerhard, 834 S.W.2d 902 (Mo. Ct. App. 1992) 16

Biederman v. Schnader, Harrison, Siegal & Lewis, 765 F. Supp. 1057 (D. Kan. 1991) 16, 17

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) *passim*

Calder v. Jones, 465 U.S. 783 (1984) 21

Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993) 11, 12

Colwell Realty Invs., Inc. v. Triple T Inns of Ariz., Inc., 785 F.2d 1330 (5th Cir. 1986) 20

Diamond Mortgage Corp. of Ill. v. Sugar, 913 F.2d 1233 (7th Cir. 1990) 18

Federal Deposit Ins. Corp. v. Malmo, 939 F.2d 535 (8th Cir. 1991) 13, 15

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 10, 23

Hill v. Sidley & Austin, 762 F. Supp. 931 (S.D. Fla. 1991) 17, 18

Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773 (5th Cir. 1986) 16, 20

International Shoe Corp. v. Washington, 326 U.S. 310 (1945) 11

TABLE OF AUTHORITIES – Continued

Page

Myers v. Emery, 697 S.W.2d 26 (Tex. App. – Dallas 1985, no writ) 17

National Indus. Sand Ass'n v. Gibson, No. D-3855, 1995 WL 346091 (Tex. Apr. 27, 1995) 11, 12, 21

Patterson v. Dietze, Inc., 764 F.2d 1145 (5th Cir. 1985) 20

Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985) 16

Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201 (5th Cir. 1993) 10, 11

Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415 (5th Cir. 1993) 10, 12, 23

Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990) 10

Shaffer v. Heitner, 433 U.S. 186 (1977) 11

Sher v. Johnson, 911 F.2d 1357 (9th Cir. 1990) 13, 14, 15, 16

Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir. 1988) 22

Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985) .. 11, 16

Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff, P.A., 85 A.D.2d 861, 446 N.Y.S.2d 447 (N.Y. App. Div. 1981) 16

Westmoreland Cole Co. v. Kaufman, 184 W.Va. 195, 399 S.E.2d 906 (W.Va. 1990) 16

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 12, 17, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C.A. § 1254(1) (West 1993) 1

FED. R. CIV. P. 12(b)(2) 3

TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-045 (Vernon 1986) 10

OPINIONS BELOW

This is an appeal from the final judgment dismissing this case by the United States District Court for the Northern District of Texas, Dallas Division. The opinion for the United States Court of Appeals for the Fifth Circuit is reported at 41 F.3d 229 (5th Cir. 1995). Copies of the district court's order and judgment and the Fifth Circuit's opinion are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The date of the entry of the judgment sought to be reviewed is January 4, 1995. The motion for rehearing and suggestion for rehearing en banc was overruled February 7, 1995. This Court has jurisdiction to review the opinion and judgment of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

STATEMENT OF THE CASE

This is an appeal from an order of final judgment dismissing the case, which was rendered by the United States District Court, Northern District of Texas, Dallas Division. R1 at 143, 148. Trinity Industries, Inc. ("Trinity") filed suit in Texas state court against the Defendants, Myers & Associates, Ltd. and Richard J. Myers (collectively the "Myers Defendants"). R1 at 6. The Myers Defendants filed separate special appearances to contest the state court's jurisdiction over them and then removed

the case to federal court. The Myers Defendants subsequently filed a motion to dismiss. The district court found that Texas did not have general or specific jurisdiction over Myers or the Myers Defendants. R1 at 146-47. Trinity then timely appealed the judgment on the issue of specific jurisdiction only. R1 at 149. A panel of the Fifth Circuit Court of Appeals reversed the judgment of the district court and remanded the case for trial. The basis for reversal of the district court's judgment was that the Myers Defendants had sufficient contacts with Texas to justify exercising specific jurisdiction over the Myers Defendants in this lawsuit. 41 F.3d at 231-32.

ARGUMENT FOR GRANTING THE WRIT

This diversity suit is based on Trinity's claim for breach of fiduciary duty, civil conspiracy, negligence and punitive damages against the Myers Defendants. Trinity's causes of action against the Myers Defendants arise from legal services performed by the Myers Defendants on behalf of Johnstown American Corporation ("Johnstown"), a Pennsylvania corporation, which Trinity contends violated an alleged attorney-client relationship between Trinity and the Myers Defendants. A patent infringement lawsuit is currently pending in a Pennsylvania federal court between Johnstown and Trinity styled *Johnstown America Corp. v. Trinity Indus., Inc.* (Cause No. 92-587-J in the United States District Court, Western District of Pennsylvania, Johnstown Division).

The legal services performed by the Myers Defendants on behalf of Johnstown and at the direction of

Trinity's law firm, Baker & Botts, which services are the subject of this suit, were **not** performed in Texas. R1 at 10. Accordingly, the federal district court in Texas properly held that it lacks personal jurisdiction over the Myers Defendants and correctly dismissed the action in accordance with FED. R. CIV. P. 12(b)(2).

To find specific jurisdiction over Myers and the Myers Firm in this case it is necessary to conclude that the unilateral conduct of a Texas resident – Trinity – is sufficient to confer jurisdiction over the nonresident defendants. Such a finding, however, violates the United States Constitution's guarantee of due process. There is no connection in the case between the Myers Defendants, the State of Texas, and Trinity's causes of action. Further, adopting a " 'highly realistic' approach,"[1] the Myers Defendants have not purposefully directed their activities at residents of Texas sufficient to justify the call to a Texas court. Accordingly, the Texas long-arm statute does not reach the Myers Defendants. Therefore the district court properly dismissed the case, and the court of appeals' reversal of this order is constitutionally infirm.

FACTUAL BACKGROUND

Trinity is a Delaware corporation with its principal place of business and headquarters in Dallas, Texas. Trinity is primarily in the business of heavy metal products including the manufacturing and fabricating of railcars.

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[1] 41 F.3d at 230 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985)).

Myers & Associates, Ltd. ("Myers Firm"), is a law firm and an Illinois personal corporation with its principal place of business in Chicago, Illinois. R1 at 2. Richard J. Myers and Edward D. Gilhooly are attorneys and are citizens of Illinois. R1 at 2. Myers, President of Myers & Associates, Ltd., is licensed to practice law in the State of Illinois and is not licensed in any other state. R1 at 60-61.

The Myers Firm does not perform any services in Texas, it has no contacts with Texas, and it is not subject to service of process in Texas. R1 at 61. Similarly, Myers, an Illinois resident, has never resided in Texas, is not doing business in Texas, has no contacts with Texas, nor is he subject to service of process in Texas. R1 at 61. Neither the Myers Firm nor Myers was served with process in the Texas state court action; however, on July 9, 1993, Trinity's counsel provided the Myers Defendants with a "courtesy" copy of Trinity's Original Petition which was filed in Texas state court. On August 5, 1993, the Myers Defendants filed a special appearance in the Texas state court action and objected to the exercise of jurisdiction over them and removed the action to the federal district court.

Neither Myers nor his law firm have employees, servants or agents in the State of Texas. R1 at 61. The Myers Firm does not maintain a place of business, own real or personal property, maintain any bank accounts, telephone number or post office in Texas, nor does it pay any local or state taxes to any taxing authority in the State of Texas. *Id.* Neither Myers nor his law firm have ever operated, conducted, engaged in, or carried on a business or business venture in the State of Texas. *Id.* Neither Myers nor his law firm have committed a tort in

Texas; nor have they contracted by mail or otherwise with a Texas resident or recruited Texas residents, directly or indirectly, for employment inside or outside of the state. *Id.* Neither Myers nor his law firm are licensed to do business in the State of Texas, nor did they solicit business, engage in any course of conduct or derive revenue from goods sold or services rendered in the State of Texas. *Id.*

Myers was formerly the Chief Patent Counsel for Pullman, Inc. ("Pullman") in Chicago, Illinois. *Id.* In approximately 1980, Pullman Inc. was acquired by Wheelabrator Frye and experienced various organizational changes. *Id.* By 1984, Pullman's freight car division was named "Pullman Standard, Inc." and officed the freight car engineering personnel. *Id.* In addition to acquiring Pullman, Wheelabrator Frye interests also acquired various other Pullman locations, including the main corporate operations located in downtown Chicago, Illinois which officed the marketing, engineering and freight car testing facilities and the engineering offices located in Hammond, Indiana. *Id.* Engineering personnel were located in both Chicago and Hammond, Indiana where such engineering and testing operations took place. R1 at 61-62. Around this time, Wheelabrator management requested that Myers go into private practice and continue to handle, as outside counsel, the various transactions involving the operations of the former Pullman Inc., which included Pullman Standard, Inc. R1 at 62.

In 1984, Trinity purchased from Pullman Standard, Inc. engineering and marketing knowledge, and in some instances the personnel and physical locations located both in Chicago and in Hammond, Indiana. *Id.* Subsequently, Trinity moved these divisions to Michigan City,

Indiana. *Id.* In the sale, Myers was able to inform Trinity about the patents of Pullman Standard, Inc. as well as its trademarks. *Id.* Myers' role in the sale to Trinity from Pullman Standard, Inc. of the marketing, engineering and technical data was to give patent and trademark information to Trinity. *Id.* After the sale was complete, Richard Snyder, who left Pullman Standard, Inc. and went to work with Trinity, requested that Myers continue to help the newly acquired division. *Id.*

Any help subsequently provided to Trinity by Myers and the Myers Firm originated in Chicago, Illinois and Hammond, Indiana and was performed in these places. *Id.* Later, Trinity moved its operations to Michigan City, Indiana. *Id.*

In one instance, the Myers Firm and Myers were retained by Trinity to defend it in a patent infringement case related to a "well car," a type of railroad car. *Id.* This work lasted only eight months and ended in October 1990 or reasonably soon thereafter. *Id.* In that case, which was styled *Transit America, Inc. and Thrall Car Mfg. Co. v. Trinity Indus., Inc.* (pending in the United States District Court, Northern District of Texas, Fort Worth Division), it was alleged that Trinity infringed on a "well car" patent. *Id.*

At Trinity's request, Myers made approximately four trips to Texas between 1984 and 1991. *Id.* In 1993, again specifically at Trinity's request, Myers made a final trip to Texas. R1 at 62-63. Each of Myers' trips to Texas was made at the request of or for the convenience of Trinity. R1 at 63. Two of these trips were for the purpose of meeting with the officers of Trinity, another trip was to

inspect a railroad car and the other was to review files in the patent infringement action. *Id.* The trips to Texas between 1984 and 1991, as well as Myers' communications with Trinity during this time frame, were rare, sporadic and, since 1991, virtually nonexistent. *Id.* All of these trips and communications concerned work being performed in Illinois. *Id.* The 1993 trip was made at the specific request of Trinity and, in fact, turned out to be nothing more than a pretext to get Myers to Texas. *Id.* At the time the trip was requested, its purpose was very vague. *Id.* When Myers arrived at the meeting, however, Trinity's attorneys (from Baker & Botts) proceeded to question him about the facts that are the basis of the allegations in this lawsuit. *Id.* Accordingly, Myers promptly left the meeting and returned to Illinois. *Id.*

Since 1991, Myers has not received any new business from Trinity. *Id.* The only matters on which Myers worked for Trinity since 1991 have involved older pending business, including, patent office actions, trademark renewals and maintenance of tax fees on patents in the United States and foreign countries. *Id.* None of this work was performed in Texas. *Id.*[2] Virtually all of the work Myers performed on Trinity's behalf was done with and for the engineers at Chicago, Illinois or Hammond, Indiana, or later at the Michigan City, Indiana office. *Id.* The Myers Firm sent its fee statements to and received payment from Trinity's Dallas office. R2 at 19.

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[2] In addition to the infrequent trips to Dallas made at Trinity's request, the only other time Myers has been to Texas was in approximately 1951 when he drove through the Texas Panhandle on his way to California. R1 at 64.

Edward Gilhooly, an attorney licensed to practice law in Illinois, performed work as an independent contractor for the Myers Firm (from July 1990, until early 1993) for Trinity. R1 at 6, 7, 33, 34, 144; R2 at 19. Gilhooly performed limited legal work for Trinity: first, he completed four or five railcar patents during 1990-92 (R1 at 35; R2 at 139-40);[3] and second, for about eight months Gilhooly assisted Myers in defending Trinity in the patent-infringement case in federal district court in Fort Worth, Texas (R1 at 34-35; R2 at 55).[4]

Since entering private practice, Myers has been retained by numerous other companies which were formed as a result of the breakup of Pullman. R1 at 19. Johnstown American Corporation ("Johnstown"), a Pennsylvania corporation, solicited Myers' representation. R1 at 19. Myers performed patent-related services on Johnstown's behalf. R1 at 19. None of the work Myers performed for Johnstown, however, was performed in Texas. R1 at 19. In November 1991, Gilhooly began performing other patents and trademark work for Johnstown. R1 at 8, 35, 63. None of Gilhooly's work involved Trinity nor did it involve any contact with Texas. R1 at 35-36, 63.

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[3] Gilhooly's only contact with Texas concerning the patents was limited correspondence with a Trinity executive. R1 at 35.

[4] Gilhooly had three limited contacts with Texas during this case: first, at Trinity's request, he attended a three-hour meeting with Trinity executives in Dallas to report on the case (R1 at 35, 138; R2 at 61); second, Gilhooly exchanged some telephone calls and correspondence with Trinity representatives in Texas (R2 at 50, 58-63); and third, the Fort Worth federal district court admitted Gilhooly to appear *pro hac vice* (R2 at 54-55, 68-71).

In December 1992, Johnstown brought a patent-infringement case against Trinity in a federal district court in Pennsylvania. R1 at 8, 36, 64. The Johnstown suit involves a **coal car** – a type of railcar completely unrelated to the **well car** involved in the federal district court in Fort Worth. R1 at 36.[5] Trinity now alleges that Gilhooly assisted and counselled Johnstown in the preparation, filing and prosecution of the **coal car** case in Pennsylvania. R1 at 9. If any wrongful conduct occurred, it occurred in Illinois, Pennsylvania or both. R1 at 36, 146. None of Gilhooly's Texas contacts are related to Trinity's allegations against Gilhooly, and none of Myers' work for Johnstown involved the **coal car** at issue in the Pennsylvania litigation. R1 at 35, 64, 66-67.

Trinity then sued Myers, the Myers Firm, and Gilhooly in state district court in Dallas County, Texas, alleging breach of fiduciary duty, civil conspiracy and negligence. R1 at 6-14. Trinity alleges that the Myers Defendants, and Gilhooly failed to disclose the alleged assistance they gave to Johnstown in locating counsel and deciding whether and how to sue Trinity. *Id.* After the Myers Defendants and Gilhooly removed the case to federal court, the federal district court granted the defendants' motions to dismiss (R1 at 22, 38) and dismissed all claims for lack of personal jurisdiction. R1 at 143-48. The

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[5] The legal work Myers performed for Trinity involved patents and trademarks; however, it never involved or was related in any way to legal work relating to the Trinity "Aluminator" car, which has a sloped trough portion. R1 at 66-67. The "Aluminator" car is the car which allegedly infringes upon the Johnstown patent, according to the claims made by Johnstown in the Pennsylvania action. R1 at 64.

district court found that Texas did not have general or specific jurisdiction over the Myers Defendants or Gilhooly. R1 at 146-47.

Trinity appealed the district court's order, complaining only about the finding of lack of specific jurisdiction. Trinity's brief at 22-27. The Fifth Circuit reversed the district court's order and remanded the case for trial. 41 F.3d at 230.

ARGUMENT

I. The Law Applicable to Personal Jurisdiction Over a Nonresident Defendant.

A federal district court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. *E.g., Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993). The broad language of the Texas long-arm statute[6] permits it to reach as far as the federal constitutional requirements of due process will allow, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413 (1984); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990); therefore, these two inquiries collapse into a single due process analysis. *Ruston Gas Turbines*, 9 F.3d at 418; *Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd.*, 993

[6] Tex. Civ. Prac. & Rem. Code Ann. §§ 17.041-045 (Vernon 1986).

F.2d 1201, 1205 (5th Cir. 1993). The due process clause of the Fourteenth Amendment, as interpreted by this Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) the nonresident defendant has purposefully established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 108-09 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (citing *International Shoe Corp. v. Washington*, 326 U.S. 310, 316 (1945)).

II. "Minimum Contacts" Under the Due Process Analysis.

The basis for personal jurisdiction over the nonresident defendants in this case is specific jurisdiction. *Polythane Systems*, 993 F.2d at 1205. When the lawsuit is related to or arises out of the defendant's contacts with the forum state, the minimum contacts inquiry focuses on the relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Stuart v. Spademan*, 772 F.2d 1185, 1190 (5th Cir. 1985). The minimum contacts requirement is satisfied in this context, and *specific* jurisdiction is proper, so long as "the defendant has purposefully directed his activities at residents of the forum . . . ***and the litigation results from alleged injuries that arise out of or relate to those activities.***" *Burger King*, 471 U.S. at 472 (emphasis added); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 884 (5th Cir. 1993); *National Indus. Sand Ass'n v. Gibson*, No. D-3855, 1995 WL 346091, at *2 (Tex. Apr. 27, 1995).

Under the "minimum contacts" prong, the inquiry is whether there has been some act whereby the non-resident defendant has "purposefully availed" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws and creating a substantial connection with the forum state. *Ruston Gas Turbines*, 9 F.3d at 419; *Asahi*, 480 U.S. at 109; *Burger King*, 471 U.S. at 474-75. The "purposeful availment" requirement ensures that a non-resident defendant will not be haled into a jurisdiction based solely on "random," "fortuitous" or "attenuated" contacts or upon the "unilateral activity of another party or third person." *Burger King*, 471 U.S. at 475. The defendant's connection with the forum state must be such that it "should reasonably anticipate being haled into court in the forum state." *Ruston Gas Turbines*, 9 F.3d at 419; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Penrod Drilling*, 5 F.3d at 884; *National Indus. Sand Ass'n v. Gibson*, No. D-3855, 1995 WL 346091, at *3 (Tex. Apr. 27, 1995). Specifically in the corporate context, this Court held that when a corporation conducts activities within the forum state, it must have "clear notice" that it is subject to suit there, and be able to act in order to "alleviate the risk of burdensome litigation . . . or, if the risks are too great, [sever] its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297.

III. "Minimum Contacts" In Cases Involving Claims Arising From the Attorney-Client Relationship.

The federal courts have repeatedly addressed the unique analysis that is applied when determining if a

defendant-attorney, who has been sued for legal malpractice or such related claims, has minimum contacts with the forum state. *See, e.g., Sher v. Johnson,* 911 F.2d 1357, 1366 (9th Cir. 1990); *Federal Deposit Ins. Corp. v. Malmo,* 939 F.2d 535, 537 (8th Cir. 1991); *Austad Co. v. Pennie & Edmonds,* 823 F.2d 223, 226 (8th Cir. 1987). These cases, along with many others, apply the well-settled proposition of jurisdiction law that the "mere existence of a contract with a party in the forum state does not constitute sufficient minimum contacts for jurisdiction." *Sher v. Johnson,* 911 F.2d at 1362 (citing *Burger King,* 471 U.S. at 478). In the context of lawsuits in which plaintiffs assert legal malpractice and related claims, the federal courts have consistently held that a defendant-attorney does not have sufficient contacts with a forum state if the extent of the attorney's contacts are:

- the existence of an attorney-client relationship with a resident of the forum state;
- telephone calls or correspondence to the client in the forum state; or
- payment from the client, when the payment originates in the forum state.

See Sher v. Johnson, 911 F.2d at 1362; *Federal Deposit Ins. Corp. v. Malmo,* 939 F.2d at 537; *Austad Co. v. Pennie & Edmonds,* 823 F.2d at 226. As the Ninth Circuit explained:

> Out-of-state legal representation does not establish purposeful availment of the privilege of conducting activities in the forum state, where the law firm is solicited in its home state and takes no affirmative action to promote business within the forum state.

Sher v. Johnson, 911 F.2d at 1363.

Thus, when determining if a defendant-attorney has sufficient contacts with a forum state in the context of a legal malpractice lawsuit, the controlling inquiry is whether the attorney has taken affirmative action to promote business in the forum state. Calls to and from the forum state and receiving payment drawn from a bank located in the forum state are irrelevant. In short, because out-of-state representation does not create minimum contacts, neither do the normal incidences of representation. *Sher v. Johnson*, 911 F.2d at 1362.

Using the analysis of the Eighth and Ninth Circuits (rather than the analysis adopted by the Fifth Circuit in this case), a forum state does not have specific jurisdiction over a defendant-attorney when the attorney has not affirmatively and actively sought business in the forum state. *Austad Co. v. Pennie & Edmonds*, 823 F.2d at 226. Consequently, an attorney **does not have minimum contacts with the forum state** when the attorney:

- does not have an office in the forum state;
- is not licensed to practice in the forum state;
- makes only intermittent trips to the forum state pursuant to the representation and
- does not advertise or solicit business in the forum state.

Sher v. Johnson, 911 F.2d at 1362; *Austad Co. v. Pennie & Edmonds*, 823 F.2d at 226. Moreover, minimum contacts do not exist when the attorney does not initiate the representation, does not establish the representation in the forum state and does not perform the legal services in the forum state. *Sher v. Johnson*, 911 F.2d at 1362; *Austad Co. v. Pennie*

& Edmonds, 823 F.2d at 226. Under these circumstances, these circuits hold that the defendant-attorney has not purposefully directed his or her activities to forum state residents. *Id.*

The Fifth Circuit's opinion stands in remarkable contrast to other specific jurisdiction decisions from the other circuit courts of appeals. Contrary to *Sher*, *Austad* and *Malmo*, the Fifth Circuit determined that the incidences of representation are sufficient to create minimum contacts. 41 F.3d at 231. While, the Fifth Circuit's opinion in this case is inconsistent with that of other circuits, more importantly, the Fifth Circuit's opinion will not withstand constitutional scrutiny.

IV. The Fifth Circuit Erred in Concluding That the District Court Has Specific Jurisdiction Over the Myers Defendants.

A. The Myers Defendants have not purposefully availed themselves of the benefits and protections of the laws of the State of Texas.

To satisfy the requirements of specific jurisdiction, Trinity must establish that this action arises out of the Myers Defendants' purposeful activity directed at residents of the State of Texas. *See Burger King*, 471 U.S. at 472. In this case, Trinity did not meet this burden. None of the facts show that Trinity's claims arise out of the Myers Defendants' purposeful activity directed at residents of Texas.

1. The incidences of representation are not purposeful availment.

The Fifth Circuit recited that the long-term attorney client relationship between Trinity and the Myers Defendants, the correspondence between the two, the sporadic travel to Texas by the Myers Defendants and payment to the Myers Defendants forthcoming from Texas as establishing specific jurisdiction. 41 F.3d at 231. Other circuits have held that none of these factors satisfy a plaintiff's burden to establish that the forum state has specific jurisdiction over a defendant-attorney. *Sher v. Johnson*, 911 F.2d at 1362; *Austad Co. v. Pennie & Edmonds*, 823 F.2d at 226. None of these factors indicate purposeful availment. The mere establishment of an attorney-client relationship with a Texas client (Trinity) is insufficient to create jurisdiction. 41 F.3d at 230 (citing *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987) (merely contracting with a resident of the forum state is insufficient)). This rule is applicable even where the attorney visits the client's forum during the representation. *See Austad Co. v. Pennie & Edmonds*, 823 F.2d at 226; *Biederman v. Schnader, Harrison, Siegal & Lewis*, 765 F. Supp. 1057, 1061 (D. Kan. 1991); *Westmoreland Cole Co. v. Kaufman*, 184 W.Va. 195, 399 S.E.2d 906, 908 (W.Va. 1990); *Barnes v. Gerhard*, 834 S.W.2d 902, 903 (Mo. Ct. App. 1992); *Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff, P.A.*, 85 A.D.2d 861, 446 N.Y.S.2d 447, 449 (N.Y. App. Div. 1981). The exchange of letter and telephone calls in furtherance of the attorney-client relationship is insufficient to establish specific jurisdiction. *Stuart v. Spademan*, 772 F.2d at 1193; *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985). And, the payment of legal

services by Trinity will not establish specific jurisdiction. *Austad Co. v. Pennie & Edmonds*, 823 F.2d at 226; *Biederman v. Schnader, Harrison, Siegal & Lewis*, 765 F. Supp. at 1061; *Myers v. Emery*, 697 S.W.2d 26, 32 (Tex. App. – Dallas 1985, no writ).

2. Infrequent trips to the forum state is not purposeful availment.

Any contact that may have resulted from Myers' infrequent travels through Texas at Trinity's request are random, fortuitous and attenuated. *See World-Wide Volkswagen*, 444 U.S. at 298. All of Myers' few trips to Texas and communications with residents of Texas were at the request and for the convenience and benefit of Trinity. All of the Myers Defendants' work performed for Trinity involved the railroad engineering office located in Illinois. The Myers Defendants did not solicit Trinity to perform work on its behalf in Texas. Rather, Trinity sought the Myers Firm for services it required in Illinois. It was only through the unilateral requirements and acts of Trinity that the Myers Defendants had any contact of any kind with the State of Texas.

3. Admission *pro hac vice* is not purposeful availment.

The mere fact that the Myers firm was admitted *pro hac vice* in the Northern District of Texas to represent Trinity in one patent litigation matter does not create specific jurisdiction. This principle is most keenly illustrated in *Hill v. Sidley & Austin*, 762 F. Supp. 931, 935 (S.D.

Fla. 1991). In that case, the plaintiff sued a Chicago-based law firm in Florida state court, contending that the contract between the parties restricted the plaintiff's ability to practice law in contravention to the Model Code of Professional Responsibility. The defendant-firm removed the case to federal court and then moved to dismiss the case on lack of personal jurisdiction. The defendant-firm explained that it did not have an office in Florida and did not solicit business in that state. As further proof of its attenuated connections with Florida, the defendant-firm stated that on the few occasions when it renders legal services in Florida, its attorneys are required to be admitted *pro hac vice*. The plaintiff used this admission as evidence of minimum contacts to support imposition of specific jurisdiction over the defendant-firm.

The district court rejected the plaintiff's argument. *Hill v. Sidley & Austin*, 762 F. Supp. at 934. The court held that sending payment and correspondence to Florida does not create minimum contacts. *Id.* The court also noted that the defendant-firm did not have an office in Florida and did not solicit business in that state. *Id.* at 935. Most persuasive, however, is the court's consideration of the defendant-firm's sporadic rendering of legal services in Florida, practicing *pro hac vice*. The court reasoned that because this in-state representation occurred infrequently and such representation was unrelated to the plaintiff's claims, being admitted to the Florida bar *pro hac vice* did not create contacts with that state justifying application of personal jurisdiction over the defendant-firm. *Id.* at 935 & n.3 (citing *Diamond Mortgage Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1244-47 (7th Cir. 1990) (sporadic

legal representation in the forum state establishes minimum contacts only when the services performed are related to the malpractice claims asserted)).

This district court was true to the Court's directive in *Burger King* to apply a " 'highly realistic' approach"[7] to specific jurisdiction analysis. This approach dictates that the mere fact that a defendant-firm has been admitted *pro hac vice* in the forum state does not create specific jurisdiction over that firm. Admission *pro hac vice* is not minimum contacts, especially when such representation is infrequent and unrelated to the plaintiff's complaints.

4. When performance of legal services occurs outside the forum state, this performance is not purposeful availment.

Trinity's complaint clearly establishes that the activity at issue took place outside Texas. At issue in this case is whether the Myers Defendants allegedly disclosed confidential information to Johnstown which they allegedly acquired while representing Trinity. It is alleged that the Myers Defendants took action in Texas as part of their representation of Trinity, but Trinity is not suing the Myers Defendants as a result of that representation. Instead, Trinity is suing for alleged conduct which occurred in Illinois and Pennsylvania. This conduct, and even the Myers Defendants' representation of Johnstown, did not take place until after their contacts with the State of Texas had occurred – no matter how random and

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[7] 41 F.3d at 230 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985)).

sporadic. In short, this case is not based upon acts taken by the Myers Defendants in Texas.

5. An out-of-state attorney-client relationship is not purposeful availment.

Simply because Trinity is a forum resident does not establish that the Myers Defendants purposefully availed themselves of the benefits and protections of the laws of Texas. *Holt Oil & Gas*, 801 F.2d at 778; *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985). Certainly Trinity's mere presence in Texas does not establish that Trinity's claims arise out of the Myers Defendants' purposeful contacts with Texas. *See also Colwell Realty Invs., Inc. v. Triple T Inns of Ariz., Inc.*, 785 F.2d 1330, 1334 (5th Cir. 1986).

B. The alleged injury to Trinity occurred, if at all, outside the State of Texas.

The conduct of which Trinity complains occurred in Illinois or Pennsylvania on behalf of Johnstown, but it did not occur in Texas. The Myers Defendants could not reasonably anticipate being haled into Texas for work performed in Illinois or Pennsylvania.

Trinity also failed to establish any connection between the Myers Defendants' legal work for Trinity and their services performed on behalf of Johnstown. Trinity complains of the Myers Defendants' alleged betrayal of Trinity by helping Johnstown locate counsel and file the coal car case in federal district court in Pennsylvania. R1 at 10. The Myers Defendants were hired

by Johnstown to perform patent-related work for the Pennsylvania company. The Myers Defendants performed no services within Texas in connection with their work for Johnstown, which is the basis of this action. In fact, the *only* connection between this *current* action and Texas is that Trinity is a Delaware corporation with its principal office in Texas. This connection is tenable, at best, and is clearly insufficient to create specific jurisdiction over the Myers Defendants.

The Myers Defendants' conduct has nothing to do with the work that the Myers Defendants performed for Trinity. Trinity simply argues that the Myers Defendants were "reprehensible" by assisting a Trinity competitor. *Id.* Other than generally complaining about the nature of the Myers Defendants' alleged conduct, Trinity failed to even allege how it was harmed or damaged by the conduct. *See* R1 at 6-14.

This Court explicitly rejected the notion that mere foreseeability of injury in the forum state is sufficient to confer jurisdiction. *See Asahi*, 480 U.S. at 112; *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 295. In cases alleging nonforum conduct causing injury in the forum, jurisdiction attaches only if the defendant's intentional actions were aimed at the forum and the defendant knew that the brunt of the injury would be felt in the forum. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (forum was the focal point of the defamatory story and the injury to the plaintiff's reputation); *National Indus. Sand Ass'n v. Gibson*, No. D-3855, 1995 WL 346091, at *4 (Tex. Apr. 27, 1995).

Trinity has not alleged or offered any evidence of any injury or damages occurring in Texas. Moreover, Trinity has not alleged that it felt the brunt of the injury in Texas or that the Myers Defendants knew that Trinity would feel the brunt of the alleged injury in Texas. Instead, Trinity merely makes vague allegations of "disloyal" and "reprehensible" conduct by the Myers Defendants without specifying the place of Trinity's injury. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988) (no evidence that the defendant aimed its tortious conduct at Texas or that the defendant knew that the plaintiff would feel the brunt of the injury in Texas). Here, the situs of Trinity's damages, if any, is Pennsylvania, where the coal car litigation is pending. Trinity has simply failed to establish any economic consequences of the Myers Defendants' purported conduct in Texas, and even if it had, that contact would nevertheless remain insufficient to confer specific jurisdiction.

The Myers Defendants were sued in Texas for no other reason than that Trinity is located in Dallas. The Myers Defendants carried on no activity whatsoever in Texas that is the basis for Trinity's tortious state law claims against them. The Myers Defendants availed themselves of none of the privileges and benefits of Texas law. In short, Trinity seeks to base jurisdiction on the Myers Defendants' representation of Trinity in a case that is unrelated to the basis of its purported and unspecified injury.

Simply because (i) Trinity has its principal office in Texas, (ii) Trinity requested the Myers Defendants to travel to Texas from Illinois, and (iii) Trinity was sued in

Texas should not have led the Fifth Circuit to the conclusion that the Myers Defendants "purposefully availed" themselves of the laws of Texas. The unilateral acts of Trinity do not satisfy the requirement of purposeful contact by the Myers Defendants with the forum state. *Helicopteros*, 466 U.S. at 415. Thus, Trinity's desire to seek legal advice from the Myers Defendants cannot be used to punish the Myers Defendants by conferring jurisdiction over them in Texas – a state in which Myers and his law firm have never purposefully directed their activities.

IV. The Exercise of Personal Jurisdiction Over the Myers Defendants Would "Offend Traditional Notions of Fair Play and Substantial Justice."

The factors to be considered by the Court in evaluating "fair play and substantial justice" include: (1) the burden on the defendant; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversy; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477; *Ruston Gas Turbines*, 9 F.3d at 421. The Fifth Circuit concluded that Texas' "substantial interest in protecting its residents from an [allegedly] abusive attorney-client relationship" outweighs the other factors enumerated. 41 F.3d at 232.

It is not reasonable for a Texas court to exercise personal jurisdiction over the Myers Defendants as they have not directed any activity toward Texas and the

burden of defending this case in Texas would be significant. Likewise, it offends traditional notions of fairness to confer jurisdiction over a non-resident simply because Trinity, a Texas resident, sought the Myers Defendants' services for activities outside Texas. As stated in Myers' affidavit, it would be inconvenient and burdensome for him or any other representative of the Myers Firm to defend this lawsuit in Texas. Because the Myers Defendants do not have representatives or family in Texas, they would be required to incur significant travel and lodging expense to attend depositions, hearings, meetings and the trial of the case. R1 at 64. Further, Myers, as President of the Myers Firm, would be required to be absent from work, thus causing a significant hardship to his business. *Id.* It is both unfair and unreasonable to require Myers or representatives of the Myers Firm to travel to Texas to defend this action when neither has purposely availed itself of the privilege of conducting activities in Texas. *Id.* Contrary to the Fifth Circuit's conclusion, Trinity purposefully directed its activities towards the State of Illinois and, in fact, is located in Illinois; therefore, the Texas courts have no special interest in hearing this case to correct an alleged wrong directed at a Texas resident.

Considering that the entire transaction involving the Myers Defendants occurred outside Texas and that the Myers Defendants have absolutely no contacts with Texas, it is constitutionally wrong to require them to defend themselves in Texas. To exercise jurisdiction over the Myers Defendants would contradict the constitutional protection provided in the due process clause and would

offend "traditional notions of fair play and substantial justice."

CONCLUSION

Myers & Associates, Ltd. and Richard J. Myers request that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, that this Court reverse the judgment of the Fifth Circuit and affirm the judgment of the district court.

Respectfully submitted,

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TRINITY INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

MYERS & ASSOCIATES, LTD., et al., Defendants-Appellees.

No. 93-9169.

United States Court of Appeals,
Fifth Circuit.

January 4, 1995.

Rehearing Denied Feb. 7, 1995.

Texas corporation brought suit against its former patent attorneys alleging that attorneys counseled competitor in bringing adverse litigation. Attorney's motion to dismiss for lack of personal jurisdiction was granted by the United States District Court of the Northern District of Texas, Robert B. Maloney, J. Appeal was taken. The Court of Appeals, Politz, Chief Judge, held that attorneys subjected themselves to personal jurisdiction by voluntarily assuming and continuing legal representation of Texas client.

Reversed and remanded.

Larry D. Carlson, Bryant S. McFall, Baker & Botts, Dallas, TX, for appellant.

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Scott Patrick Stolley, Thomas A. Culpepper, Thompson, Coe, Cousins & Irons, Dallas, TX, for Gilhooly.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge,

GOLDBERG and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:

Trinity Industries, Inc. appeals the dismissal for lack of personal jurisdiction of its suit against its former attorneys. Concluding that the requisite jurisdiction exists, we reverse and remand.

Background

In ruling on a motion to dismiss without an evidentiary hearing, as was done here, the district court must accept as true the uncontroverted allegations in the complaint and resolve in favor of the complainant any factual conflicts posed by the affidavits.[1] The following accords with that rubric for purposes of today's disposition.

In 1984 Trinity, a Delaware corporation with its principal place of business in Dallas, Texas, purchased certain assets of Pullman Standard, Inc., and engaged the latter's Illinois patent attorneys, Myers & Associates, Ltd., for representation in patent and trademark matters. From 1984 to early 1993 the Myers firm, through its name partner Richard J. Myers, and Edward D. Gilhooly, a contract attorney, represented Trinity on an ongoing basis, including defense of a patent infringement suit in

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[1] *Wilson v. Belin*, 20 F.3d 644 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994).

the Northern District of Texas. Myers identified 40 matters that his firm was handling for Trinity as of February 1993.

In December 1992, Johnstown American Corporation, a Trinity competitor in Pennsylvania, filed a patent infringement action against Trinity in district court in the Western District of Pennsylvania. According to Trinity, Myers and Gilhooly counseled Johnstown in the preparation and prosecution of that litigation.

Trinity filed the instant action in Texas state court against Myers, Gilhooly, and the Myers firm, alleging breach of fiduciary duty, civil conspiracy, and negligence. The defendants removed the action to federal court and sought dismissal for lack of personal jurisdiction. The district court granted their motion and Trinity timely appealed.

Analysis

A federal court sitting in diversity may exercise jurisdiction over a nonresident defendant to the same extent as a forum state court. Because the Texas long-arm statute extends to the fullest constitutional limits, defendants' amenability to suit in Texas turns on an analysis of due process parameters.[2]

Due process permits the assertion of specific jurisdiction over an out-of-state defendant if he has "purposefully directed his activities at residents of the forum state . . . and the litigation results from alleged injuries

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[2] *Wilson.*

that arise out of or relate to those activities,"[3] unless the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. When the district court rules on a motion to dismiss without an evidentiary hearing the plaintiff need only present a *prima facie* case of personal jurisdiction.[4] We conclude that Trinity has done so.

The *Burger King* Court directed us to take a "highly realistic"[5] approach to deciding whether a defendant has established the requisite minimum contacts. The bare existence of an attorney-client relationship is not sufficient.[6] Here, however, there is more. The record reflects a factual scenario sufficient to support an inference that the defendants purposefully availed themselves of the privilege of doing business in Texas.[7] Myers considered

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[3] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (internal quotations and citations omitted).

[4] *Wilson.*

[5] 471 U.S. at 479, 105 S.Ct. at 2185.

[6] Id.; *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773 (5th Cir.1986), *cert. denied*, 481 U.S. 1015. 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987).

[7] *See Burger King*, 471 U.S. at 473, 105 S.Ct. at 2182-83 (with respect to interstate contractual obligations, personal jurisdiction exists over parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state"); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1170 (5th Cir.1985) ("It is not unfair to require a nonresident to defend itself in the courts of the forum state if the nonresident engaged in activities that will support an inference that the nonresident defendant purposefully availed [itself] of the benefits of conducting business in the forum.") (internal quotation and citation omitted).

Trinity a major client. His firm represented the Texas-based company over the course of eight years, regularly handling patent matters involving the former Pullman-Standard assets. The legal representation required regular mail and telephonic communications with Texas and, on occasion, physical presence for meetings in Dallas. Over a three-year period Myers appeared *pro hac vice* for Trinity in the Northern District of Texas. Further, the Myers firm billed Trinity in Texas and payment was forthcoming from Texas.

These contacts amount to a substantial connection with Texas and cannot accurately be characterized as random, fortuitous, or incidental.[8] Rather, they indicate that the defendants deliberately availed themselves of the benefits of an ongoing relationship with a Texas client and reasonably should have anticipated the possibility of being haled into court in Texas for claims arising out of or related to that relationship.[9] As the Court observed in

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[8] *Cf. Holt* (specific jurisdiction was lacking where performance of the drilling contract from which the litigation arose was centered elsewhere); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir.1987) (personal jurisdiction over the defendant attorneys did not lie where a single lawsuit gave rise to the litigation, the plaintiff was one of several clients brought in to share the costs, and the principal connection to the forum was plaintiff's residence).

[9] *Cf. Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990) (specific jurisdiction over nonresident doctor exists where forum state patient had an ongoing relationship with the doctor and treatment in part occurred in the forum state); *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310 (9th Cir.1987) (provision of ongoing accounting services to forum resident was sufficient to support specific jurisdiction over out-of-state accountant).

Burger King, an individual who purposefully directs his activities to forum state residents and derives benefits therefrom should be answerable in the forum for the consequences of his activities; "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."[10] That Trinity initially solicited the services of the Myers firm does not change this result. although personal jurisdiction does not lie when the defendant cannot control vulnerability to suit, the defendants at bar voluntarily assumed and continued the obligation of representing the Texas client.[11]

Gilhooly insists that his contacts were less substantial than Myers'. We find the differences to be merely quantitative, not qualitative. Gilhooly represented Trinity for a shorter period of time and on fewer matters than did Myers but, in consultation over a two-year period with a Trinity executive in Texas, he completed several patent applications. He also appeared in the Northern District of Texas litigation for eight months. Like Myers, Gilhooly had an ongoing relationship with Trinity. The quantitative differences are not decisive.[12] Nor is the fact that Gilhooly worked for the Myers firm; he nevertheless availed himself, as an attorney, of the opportunity to represent a Texas resident.

The second inquiry is whether the litigation resulted from injuries arising out of or related to the defendants'

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[10] 471 U.S. at 474, 105 S.Ct. at 2183.

[11] *See Hylwa.*

[12] *Thompson.*

forum contacts. The district court answered this in the negative, considering the pertinent contacts to be those with Johnstown occurring in Pennsylvania or Illinois. In this the district court erred. The essence of Trinity's complaint is that its own lawyers counseled its competitor in bringing adverse litigation. There would be no injury or basis for a claim but for the fact that Myers and Gilhooly represented Trinity in Texas before and during their engagement by Johnstown. Assuming minimum contacts exist, as they do herein, a lawyer accused of violating his or her professional obligations to a client is answerable not only where the alleged breach occurred but also where the professional obligations attached.[13] In this instance, that attaching was within the state of Texas.

Finally, we turn to the reasonableness inquiry. Texas has a substantial interest in protecting its residents from an abusive breach of the attorney-client relationship by the attorneys. The defendants have not demonstrated that other considerations outweigh this interest. We therefore conclude that they are amendable to suit in Texas and that no due process violation is occasioned thereby.

REVERSED and REMANDED for further proceedings consistent herewith.

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[13] *See Hylwa; Waterval v. District court in and for El Paso County*, 620 P.2d 5 (Colo.1980), *cert. denied*, 452 U.S. 960, 101 S.Ct. 3108, 69 L.Ed.2d 971 (1981).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9169

TRINITY INDUSTRIES, INC.,

Plaintiff-Appellant,

versus

MYERS & ASSOCIATES, LTD., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(February 7, 1995)

Before POLITZ, Chief Judge, GOLDGERG, and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TRINITY INDUSTRIES, INC.,

Plaintiff

No. 3:93-CV-1587-T

v.

MYERS & ASSOCIATES, LTD.,
RICHARD J. MYERS, and
EDWARD D. GILHOOLY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed Nov. 30, 1993)

Before the Court are Defendants' Motions to Dismiss for Lack of Personal Jurisdiction. Also before the Court is Defendant Gilhooly's Alternative Motion to Transfer Venue. The motions are opposed. After consideration of the motions, response, and replies, the Court is of the opinion that the Motions to Dismiss should be granted and the Motion to Transfer Venue should be declared moot.

This suit concerns Defendants' alleged acts of breach of fiduciary duty, civil conspiracy, and negligence. Trinity alleges that Defendants actively aided and assisted a competitor, Johnstown America Corporation, to prepare, file, and prosecute a lawsuit against Trinity while Defendants were representing Trinity. Specifically, Trinity

claims that Defendants committed the alleged acts by (1) attending a strategy meeting with Johnstown to discuss its patent infringement claim against Trinity and to determine whether Johnstown should file a lawsuit against Trinity; (2) speaking with Johnstown's officers concerning its selection of trial counsel in its lawsuit against Trinity; (3) interviewing candidates for the position of Johnstown's trial counsel in its lawsuit against Trinity; and (4) providing counsel to Johnstown concerning its lawsuit against Trinity since the filing of that lawsuit.

Trinity is a Delaware corporation with its principal place of business in Dallas, Texas. Defendant Myers & Associates, Ltd. is an Illinois personal corporation with its principal place of business in Chicago, Illinois. Defendant Myers and defendant Gilhooly are citizens of Illinois. Gilhooly maintains his own legal practice in Illinois and is not a member or employee of Myers & Associates. However, he does perform independent contract work for the firm. Johnstown is a Pennsylvania Corporation.

Defendants have filed motions to dismiss pursuant to FED. R. CIV. P. 12(b)(2) for lack of personal jurisdiction. Trinity contests the motions and asserts that jurisdiction over Defendants is proper.

The Texas long-arm statute authorizes personal jurisdiction over non-residents when their actions constitute "doing business" in the state. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.042-043. A court's jurisdictional power under the long-arm statute may be extended to the limits of the Due Process Clause of the United States Constitution. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). Due process requires that a two prong test must be met before

assertion of jurisdiction is proper. *International Shoe v. Washington*, 326 U.S. 310, 319 (1945). First, the plaintiff must show that the defendant has minimum contacts with the forum state. *Id.* Second, the plaintiff must show that exercising personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice. *Id.*

Due process requires a court to determine whether the nonresident defendant has, through its actions, purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state's law. The defendant's conduct and connection with the forum state must be such that the defendant should reasonably anticipate being haled into court in the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The minimum contacts analysis requires more than counting the nonresident's contacts with the forum. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).

The two types of jurisdiction which satisfy the *International Shoe* analysis are general and specific jurisdiction. General jurisdiction is invoked when a defendant has pervasive, systematic, and continuous contacts with the forum state, even though the contacts are unrelated to the cause of action. *Bearry v. Beach Aircraft Corp.*, 818 F.2d 370, 379 (1987). Specific jurisdiction is invoked when a defendant's contacts with the forum are more limited, but arise out of or are related to the cause of action. *Id.*

Trinity seeks to invoke both general and specific jurisdiction as to Defendants. Trinity contends that personal jurisdiction exists based on the attorney-client relationship between Defendants and Trinity. In support of its contention, Trinity list [sic] factors for the Court to consider. Those factors are (1) that Myers and the Myers firm represented Trinity for almost a decade, (2) that it was a major client for the firm, (3) that Myers, the firm, and Gilhooly made numerous trips to Texas in connection with their representation of Trinity, (4) that the firm submitted bill statements to Trinity in Dallas, (5) that the firm was paid by check from Trinity in Dallas, (6) that Meyers, the firm, and Gilhooly made and received telephone calls to and from Trinity in Dallas, (7) that Myers, the firm, and Gilhooly sent and received correspondence to and from Trinity in Dallas, and (8) that Myers, the firm, and Gilhooly represented Trinity in an unrelated trial in Fort Worth. Trinity alleges that but for the Defendants' contacts with Texas, they would have never entered into or sustained the attorney-client relationship with Defendants.

At issue in this case is whether Defendants disclosed confidential information to Johnstown which they allegedly acquired while representing Trinity. Therefore, Trinity is suing for alleged acts which would have occurred in Illinois or Pennsylvania. This case is not based upon acts taken by Defendants in Texas. Accordingly, the requisite relationship among Defendants, the state of Texas, and Trinity's complaint is insufficient to warrant the exercise of specific jurisdiction over Defendants.

Defendants' random and sporadic trips to Texas are also insufficient to confer general jurisdiction over Defendants. Defendants' activities lack the continuous and systematic requirement to confer such jurisdiction. Additionally, Defendants' contacts in connection with the state of Texas are not such that they would reasonably anticipate being haled into court in Texas.

It is therefore **ORDERED** that the Motion to Dismiss filed by Defendant Gilhooly on August 25, 1993, is **granted.**

It is **FURTHER ORDERED** that the Alternative Motion to Transfer Venue filed by Defendant Gilhooly on August 25, 1993, is **moot.**

It is **FURTHER ORDERED** that the Motion to Dismiss filed by Defendants Myers & Associates, Ltd. and Richard J. Myers on August 25, 1993, is **granted.**

It is **FURTHER ORDERED** that Plaintiff's complaint is **dismissed without prejudice.**

Signed this 30th day of November 1993.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TRINITY INDUSTRIES, INC.,

Plaintiff

v. No. 3:93-CV-1587-T

MYERS & ASSOCIATES, LTD.,
RICHARD J. MYERS, and
EDWARD D. GILHOOLY,

Defendants.

FINAL JUDGMENT

(Filed Nov. 30, 1993)

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered.

It is **ORDERED** and **ADJUDGED** that Plaintiff's complaint is dismissed without prejudice.

Signed this 30th day of November 1993.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

Supreme Court, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

(2)

No. 94-1842

In The

Supreme Court of the United States

October Term, 1994

MYERS & ASSOCIATES, LTD., RICHARD J. MYERS, AND EDWARD D. GILHOOLY,

Petitioners,

v.

TRINITY INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Petitioners Myers & Associates, Ltd. and Richard J. Myers are subject to personal jurisdiction in Texas, when Texas-based Respondent Trinity Industries, Inc.'s causes of action arise out of or relate to Petitioners' multiple and voluntary contacts with Texas.

LIST OF PARTIES

The following are parties in this case:

Trinity Industries, Inc.
Myers & Associates, Ltd.
Richard J. Myers
Edward D. Gilhooly

RULE 29.1 LISTING

The following are the parent companies and non-wholly owned subsidiaries of Trinity Industries, Inc.:

Trinity Balco, Inc.
Productos de Carretera, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 LISTING	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. PETITIONERS ARE SUBJECT TO PERSONAL JURISDICTION IN TEXAS	8
A. Applicable Legal Standards	8
B. Minimum Contacts	9
1. Purposeful Availment	9
2. Respondent's Causes of Action Arise Out of or Relate to Petitioners' Contacts With Texas	14
C. Traditional Notions of Fair Play and Substantial Justice	19
II. THERE IS NO GOOD REASON TO GRANT A WRIT OF CERTIORARI IN THIS CASE	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 9

Austad Co. v. Pennie & Edmonds, 823 F.2d 223 (8th Cir. 1987) 21, 22, 23

Barnes v. Gerhard, 834 S.W.2d 902 (Mo. Ct. App. 1992) 23

Biederman v. Schnader, Harrison, Siegal & Lewis, 765 F. Supp. 1057 (D. Kan. 1991) 22, 23

Bullion v. Gillespie, 895 F.2d 213 (5th Cir. 1990) 8

Burger King v. Rudzewicz, 471 U.S. 462 (1985) .... *passim*

Calder v. Jones, 465 U.S. 783 (1984) 18

Entek Corp. v. Southwest Pipe & Supply, 683 F. Supp. 1092 (N.D.Tex. 1988) 17, 20

Equifax Services v. Hitz, 905 F.2d 1355 (10th Cir. 1990) 12

Far West Capital v. Towne, 46 F.3d 1071 (10th Cir. 1995) 18

FDIC v. Malmo, 939 F.2d 535 (8th Cir. 1991) 21, 22

Hanson v. Denckla, 357 U.S. 235 (1958) 8

Hill v. Sidley & Austin, 762 F. Supp. 931 (S.D. Fla. 1991) 23

Hylwa v. Palka, 823 F.2d 310 (9th Cir. 1987) 11, 16, 17, 19

Int'l Shoe v. Washington, 326 U.S. 310 (1945) 8

Lanier v. American Bd. of Endodontics, 843 F.2d 901 (6th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988) 12

TABLE OF AUTHORITIES – Continued

Page

Mississippi Interstate Express v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982) 11, 12, 13, 14

Pedelahore v. Astropark, Inc., 745 F.2d 346 (5th Cir. 1984) 8

Polythane Sys. v. Marina Ventures Int'l, 993 F.2d 1201 (5th Cir. 1993) 20

Schlobohm v. Shapiro, 784 S.W.2d 355 (Tex. 1990) 8

Sher v. Johnson, 911 F.2d 1357 (9th Cir. 1990) 21, 22, 23

Southmark Corp. v. Life Investors, 851 F.2d 763 (5th Cir. 1988) 18

Thompson v. Chrysler, 755 F.2d 1162 (5th Cir. 1985) 12

Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) 12

Trinity Indus. v. Myers & Associates, 41 F.3d 229 (5th Cir. 1995), *petition for cert. filed* 2

Waterval v. District Court, 620 P.2d 5 (Colo. 1980), *cert. denied*, 452 U.S. 960 (1981) 15, 16

Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff, 446 N.Y.S.2d 447 (N.Y. App. Div. 1981) 23

World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) 9, 19

STATUTES AND RULES

Sup. Ct. R. 10.1 21

Sup. Ct. R. 15.1 3

OPINIONS BELOW

The Petition for Writ of Certiorari correctly describes the opinion below.

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari correctly describes this Court's jurisdiction.

STATEMENT OF THE CASE

On July 7, 1993, Trinity Industries, Inc. ("Trinity") filed suit against Myers & Associates, Ltd., Richard J. Myers, and Edward D. Gilhooly. In this brief, Trinity refers to these defendants as the "Myers Firm," "Myers," and "Gilhooly"; and it refers to the Myers Firm and Myers collectively as the "Myers defendants." After removing the case to federal court, R1 at 1, 15, all the defendants moved to dismiss the case for lack of personal jurisdiction on August 25, 1993. R1 at 38. The Myers defendants accompanied their motion with an Affidavit of Richard J. Myers that addressed the personal jurisdiction issues. R1 at 60.

Trinity deposed Myers and Gilhooly on the personal jurisdiction issues. During the deposition of Myers, it became apparent that several statements in his affidavit were incorrect. The Myers defendants filed with the district court an Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers. R1 at 86. In that document, they explained that "[d]uring the examination

of Mr. Myers, certain errors in the Affidavit filed became apparent." R1 at 86-87. The purpose of the Advisory to the Court was to correct those "errors" "[i]n an effort to clarify any misunderstanding and so as not to mislead either the Court or opposing counsel." R1 at 87.

Trinity filed its response to the dismissal motions on November 1, 1993. R2 at 1. On November 30, 1993, the district court entered an Order granting defendants' motions to dismiss and entered Final Judgment in the case. R1 at 143, 148.

Trinity filed its notice of appeal on December 21, 1993. R1 at 149. In a unanimous opinion, a panel of the Fifth Circuit reversed and remanded, finding that the Myers defendants' contacts with Texas were such that subjecting them to personal jurisdiction in Texas would not offend due process. The Fifth Circuit also sustained jurisdiction over defendant Gilhooly even though his contacts with Texas were fewer than those of the Myers defendants. *Trinity Indus. v. Myers & Associates*, 41 F.3d 229, 231-32 (5th Cir. 1995), *petition for cert. filed*. The Myers defendants then filed their Petition for Writ of Certiorari with this Court. Defendant Gilhooly has not filed a Petition for Writ of Certiorari.

STATEMENT OF FACTS

Trinity is headquartered in Dallas, Texas. Its business focuses primarily on heavy metal products, including the manufacture of rail cars. One of Trinity's competitors in the rail business is a company called Johnstown America Corporation ("Johnstown America"). On December 11,

1992, Johnstown America filed a patent infringement lawsuit against Trinity in the United States District Court for the Western District of Pennsylvania.

The defendants – Chicago lawyers and their law firm – were Trinity's lawyers. They represented Trinity on an ongoing basis from 1984 through at least early 1993. R2 at 19-20. As of February 1993, the Myers Firm was still handling more than forty matters for Trinity. R2 at 20. During the course of that representation, the defendants learned confidential information about Trinity's business. R2 at 19.

Since the filing of the Johnstown America patent infringement action against it, Trinity has learned that its own lawyers, the defendants in this case, in violation of the fiduciary duty that they owed their then present client Trinity, assisted and counseled Johnstown America in the preparation, filing, and prosecution of the infringement suit. Trinity responded by filing this lawsuit in the Northern District of Texas.

The Myers defendants' Petition for Writ of Certiorari is littered with factual misstatements. Pursuant to Supreme Court Rule 15.1 (1995), Trinity takes this opportunity to point out several of those misstatements. (On May 18, 1995, the Myers defendants tried to correct some, but not all, of these factual misstatements by providing correction stickers to be applied to particular pages of their Petition.)

The Myers defendants assert that they "have absolutely no contacts with Texas." Petition at 24. This is wrong. Among their many contacts with the State of Texas are the following:

- *Numerous trips to Dallas.* The Myers defendants made numerous trips to Dallas to meet with Trinity personnel. R2 at 20, 40, 59, 61. Myers "personally attended several meetings in Texas during which [he] provided legal services to Trinity." R2 at 40;
- *Represented Dallas-based Trinity on scores of matters.* The Myers defendants handled numerous matters for Dallas-based Trinity, more than forty as of February 1993. R2 at 3, 20, 49, 64;
- *Were paid for work performed in Texas.* The Myers defendants were paid for legal work performed in the State of Texas. R2 at 40, 65;
- *Conferred with third parties in Texas.* The Myers defendants conferred with other parties in Texas on behalf of Trinity. R2 at 62;
- *Reported to Trinity's Dallas headquarters.* The Myers defendants received legal assignments from and reported to the Dallas headquarters of Trinity. R2 at 19, 40-42, 51, 58-60;
- *Made numerous calls to Trinity's Dallas headquarters.* Myers made numerous telephone calls to the Dallas headquarters of Trinity. R2 at 19, 42;
- *Received calls from Trinity's Dallas headquarters.* Myers received telephone calls from the Dallas headquarters of Trinity. R2 at 42, 50;
- *Sent correspondence to Trinity's Dallas headquarters.* The Myers defendants corresponded with persons in the Dallas headquarters of Trinity. R2 at 42-43, 60;
- *Received correspondence from Trinity's Dallas headquarters.* Myers received correspondence

from Dallas-based Trinity personnel. R2 at 41-42;

- *Sent bills to Trinity's Dallas headquarters.* Myers submitted monthly fee statements to the Dallas headquarters of Trinity. R2 at 19, 27-28; and

- *Received payments from Trinity's Dallas headquarters.* Myers received payments by check from the Dallas headquarters of Trinity. R2 at 19.

The Myers defendants even represented Trinity as its primary trial counsel in a federal court case in the Northern District of Texas. R2 at 19, 26. In that Texas litigation, Myers and the Myers Firm filed a Motion to Appear Pro Hac Vice as Trinity's trial counsel, stating in the motion they understood that "by appearing in this case they are subject to the rules of this Court as members of the bar of this District, and agree to be bound thereby." R2 at 47. The Texas court granted that motion, allowing the Myers defendants "to appear pro hac vice in this [Texas] action on behalf of Defendant Trinity Industries, Inc." R2 at 47.

Another factual misstatement in the Petition for Writ of Certiorari is the claim by the Myers defendants that they represented Trinity in the Texas lawsuit for only eight months. Petition at 6. In fact, they represented Trinity in that Texas lawsuit for more than three years. R2 at 24, 26, 29-30, 47, 52-53, 68-71. Myers made this same factual misstatement in the affidavit that he filed with his motion to dismiss. In his Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers filed with the district court, Myers admitted that the statement that this Texas representation lasted only eight months

was "incorrect." R1 at 87. Yet Myers now makes the same factual misstatement to this Court.

Another factual misstatement in the Petition for Writ of Certiorari is the claim by the Myers defendants that they did not "derive revenue from . . . services rendered in the State of Texas." Petition at 5. Myers made this same statement in his affidavit filed with the district court. In his deposition he admitted that this statement was wrong:

> Q. . . . We can agree that you and your law firm have, in fact, derived revenue from services rendered in the state of Texas?
>
> A. Yes.
>
> Q. So the statement in the last sentence of paragraph five of your affidavit is false?
>
> A. It would appear that – I'm reading it myself – that it appears it needs clarification or something.
>
> Q. It needs to be changed, doesn't it?
>
> A. I guess it was just an error. . . .

R2 at 33. In his Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers, Myers admitted that the statement in his affidavit about not receiving revenue for services rendered in Texas was "erroneous." R1 at 87. Yet in his Petition he makes precisely the same factual misstatement.

In summary, contrary to the misstatements of fact in the Petition for Writ of Certiorari, the record is clear that the Myers defendants have had numerous significant contacts with the State of Texas, that they represented

Trinity in a Texas lawsuit for three years, and that they derived revenue from Trinity for legal services that they rendered to Trinity in Texas.

SUMMARY OF ARGUMENT

The Myers defendants are subject to the *in personam* specific jurisdiction of the district court in the Northern District of Texas. Trinity's causes of action stem from the fiduciary duty and other duties defendants owed their client Trinity and, therefore, arise out of or relate to defendants' contacts with the forum. Had the Myers defendants wanted to avoid contacts with Texas, they could have declined Trinity's requests for representation. The law cannot allow defendants to develop and benefit from an interstate attorney-client relationship focused in the client's home state only to later permit the defendants to betray that relationship without fear of accountability in the client's home state.

There is no good reason to grant a Writ of Certiorari in this case. The relevant legal rules are well established and noncontroversial. This case involves no more than the application of those rules to the unique facts of the case. The Fifth Circuit decided this case correctly. Its decision does not conflict with the decisions of any other Appeals Courts.

ARGUMENT

I. PETITIONERS ARE SUBJECT TO PERSONAL JURISDICTION IN TEXAS

A. Applicable Legal Standards

A defendant is amenable to the personal jurisdiction of a federal court sitting in diversity to the same extent that it would be amenable to the jurisdiction of a state court in the same forum. *Pedelahore v. Astropark, Inc.*, 745 F.2d 346, 347 (5th Cir. 1984). Trinity served the Myers defendants pursuant to the Texas long-arm statute, and because the Texas long-arm statute confers jurisdiction to the limits of the federal constitution, *Schlobohm v. Shapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (citations omitted), the court need only consider the exercise of jurisdiction in view of the Due Process Clause of the Fourteenth Amendment. *Bullion v. Gillespie*, 895 F.2d 213, 215-16 (5th Cir. 1990).

An exercise of personal jurisdiction over a defendant comports with the requirements of substantive due process when 1) the defendant has enjoyed "minimum contacts" with the forum, *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945); and 2) such an exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

Under the first prong of this due process test, a defendant has established minimum contacts if he has purposefully availed himself of the benefits and protections of the forum and its laws, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and should reasonably expect to be

haled into court in the forum to defend himself in a lawsuit arising out of or related to that relationship. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295 (1980); *accord Burger King*, 471 U.S. at 474. This Court has emphasized that with respect to interstate contractual obligations, parties who "reach out beyond one state and create *continuing relationships and obligations* with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. *Burger King*, 471 U.S. at 473 (emphasis added).

The second prong of the due process test, a reasonableness inquiry, involves an evaluation of several factors, including: 1) the burden on the defendant; 2) the interests of the forum State; and 3) the plaintiff's interest in obtaining convenient and effective relief. *World-Wide Volkswagen*, 444 U.S. at 292; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). Often, the interests of the plaintiff and the forum will justify even serious burdens placed on nonresident defendants. *Asahi*, 480 U.S. at 114. These interests may serve to establish reasonableness of jurisdiction upon a lesser showing of minimum contacts than might otherwise be required. *Burger King*, 471 U.S. at 477.

B. Minimum Contacts

1. Purposeful Availment

Through numerous contacts, the Myers defendants willingly cultivated their attorney-client relationship with Trinity and obtained trade secrets and confidential information from Trinity. They later breached duties that arose from this relationship. To avoid answering for their

wrongs in Texas, the Myers defendants have denied that they took any affirmative steps to initiate or maintain their Texas business. When juxtaposed with a list of their Texas contacts, however, the declaration of the Myers defendants that they did not take affirmative steps to cause business activity in Texas appears disingenuous, at best.

The Myers defendants:

- made numerous trips to Dallas in connection with their representation of Trinity;
- represented Trinity in a Texas lawsuit as its lead trial counsel for three years;
- represented Trinity on myriad matters, handling as many as forty matters for Trinity during the relevant period of time;
- received legal assignments and requests for legal advice from the Dallas headquarters of Trinity;
- submitted bill statements to the Dallas headquarters of Trinity;
- were paid by checks sent from the Dallas headquarters of Trinity;
- made telephone calls to Texas;
- received telephone calls from Texas;
- corresponded to persons in Texas; and
- received correspondence from persons in Texas.

R2 at 3, 19-20, 26-28, 40-43, 47, 49, 50-51, 58-62, 64.

These factors provide a clear picture as to why the Myers defendants should have reasonably anticipated the

possibility of being haled before a Texas court. Petitioners were quite willing to reap the rewards of their relationship with Dallas-based Trinity and the State of Texas; now they must answer in Texas for their betrayal of that relationship. *See Mississippi Interstate Express v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982); *Hylwa v. Palka*, 823 F.2d 310, 314-15 (9th Cir. 1987).

The Myers defendants maintain that their representation of Trinity and each resulting contact with Texas were initiated by Trinity, not by them. Petition at 22-23. As the Myers defendants would explain it, they were sitting in Illinois minding their own business when Trinity came along, offering them hundreds of thousands of dollars worth of legal work, which they accepted; and unilaterally connecting them with Texas. Presumably, the Myers defendants also did not choose to appear pro hac vice to represent Trinity matter in the Northern District of Texas – a representation that lasted three years – Trinity made them do it.

The arguments of the Myers defendants ignore the law and realities of both their legal practice and their relationship with Trinity. Their lucrative attorney-client relationship with Trinity was not unilateral like a car dealer's car being driven into a distant forum, *see World-Wide Volkswagen*, 444 U.S. at 298, but involved their choice to interact with Trinity over an eight-year period in the forum.

Trinity may originally have solicited the services of the Myers defendants, but they freely accepted and continuously pursued Trinity's business. In *Burger King*, this Court explained "that parties who 'reach out beyond one

state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 471 U.S. at 473 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). Interstate actors, such as the Myers defendants who " 'purposefully derive benefit' from their interstate activities" may not later wield due process "as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Id.* at 473-74 (citations omitted). "To hold otherwise," the Fifth Circuit has explained, "would tend to immunize from suit by anyone with whom they do business, in any but their home jurisdiction, those engaged in nationwide commercial activity who conduct extensive commercial activity in other jurisdictions primarily by telephone or through the mails." *Mississippi Interstate*, 681 F.2d at 1010. If a nonresident wishes to avoid subjecting itself to the jurisdiction of a court in a particular state, the nonresident must structure its conduct so as to avoid that possibility. *See Thompson v. Chrysler*, 755 F.2d 1162, 1169 (5th Cir. 1985).

That Trinity may have initiated the contact with the Myers defendants or insisted that Myers travel to Texas in conjunction with his representation of Trinity is irrelevant. *See Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 910 (6th Cir. 1988) ("[T]he question of which party solicited the business interface is irrelevant, so long as defendant then directed its activities to the forum resident." (citation omitted)), *cert. denied*, 488 U.S. 926 (1988).

For example, in *Equifax Services v. Hitz*, 905 F.2d 1355 (10th Cir. 1990), White & White Inspection and Audit Service, Inc. ("White & White"), a corporation with its

principal place of business in Kansas, hired the defendant, a California resident, as a branch manager for its southern California operations. *Id.* at 1357. In 1988, White & White merged with the plaintiff, a corporation with its principal place of business in Kansas. *Id.* Because the defendant objected to the merger, the defendant resigned from the plaintiff corporation to become director of a competing business in California. *Id.* The plaintiff filed suit in Kansas alleging, *inter alia*, that the defendant had violated a non-competition covenant in his employment contract. *Id.* The defendant argued that personal jurisdiction was lacking because his connections with Kansas were not purposeful – they were required by the plaintiff. The Tenth Circuit rejected the defendant's argument. "[W]hen forum contacts are a natural result of a contractual relationship, it indicates purposeful affiliation with the forum through an interstate contractual relationship." *Id.* at 1359.

The approach of the Myers defendants in objecting to personal jurisdiction demonstrates their failure to grasp a simple concept posited in *Burger King* and *Mississippi Interstate* – if a party does not wish to connect itself to a particular forum, then it should reject business offers from a resident of that forum. The Petitioners' lack of "fault" for the fact that their representation of Trinity involved significant contact with Texas is of little consequence in a jurisdictional inquiry. Indeed, it begs the question: Could the Myers defendants have structured their conduct so as to avoid contact with Texas? The answer to that question is clearly, "yes"; they could have declined the work. Instead, the Myers defendants chose

to reap the financial benefits of representing a Texas client.

The Myers defendants' further suggestion that their contacts with Texas were "random" and "fortuitous", Petition at 17, is disingenuous and confusing. There is nothing either random or fortuitous about agreeing to represent a Texas-based client, communicating with that client, asking to be admitted to practice before a Texas court, and billing the Texas-based client for both forum and non-forum related professional activities. *Cf. Mississippi Interstate*, 681 F.2d at 1009.

2. Respondent's Causes of Action Arise Out of or Relate to Petitioners' Contacts With Texas

Trinity's complaint alleges the formation of an attorney-client relationship with resulting duties and the breach of those duties. The Myers defendants represented Dallas-based Trinity as its counsel on various matters since 1984. R1 at 8. As part of this representation, including their activities in Texas, the Myers defendants acquired confidential information and accepted the fiduciary duty not to disclose Trinity's trade secrets and confidences to others. R1 at 7-8. In violation of their fiduciary duty, they disclosed confidential information to Johnstown America, a competitor of Trinity, which they acquired during their representation of Trinity. R1 at 9-10.

The Myers defendants do not contradict Trinity's assertion that they owe Trinity a fiduciary duty as a result of their representation. Nor do they deny that they acquired confidential information as part of their Texas-

based representation activities. Instead, they focus on the geographics of the alleged breach. The Myers defendants contend that because any betrayal of Trinity's confidences occurred in either Illinois or Pennsylvania, Trinity's causes of action arise out of or relate to conduct occurring outside of Texas.

This is wrong. The duty Petitioners owed to Trinity arose out of their representation of Trinity. The representation revolved around the client in Dallas. The Myers defendants obtained confidential information as part of their Texas-based activities and later disclosed this information to Johnstown America. But for the Texas contacts that established and nourished the fiduciary, attorney-client relationship with Trinity, there could be no breach. But for their contacts with Texas, the Myers defendants would never have entered, nor been able to sustain, the attorney-client relationship that benefited them and which they eventually violated. Therefore, Trinity's causes of action for breach of fiduciary duties arise out of or relate to the Texas contact, as required by *Burger King*, 471 U.S. at 472.

When the duty arises out of contacts with the forum state and the harm is felt in that state, it matters not that the breach occurred elsewhere. *Waterval v. District Court*, 620 P.2d 5 (Colo. 1980), *cert. denied*, 452 U.S. 960 (1981), is on point. The defendant, a Virginia attorney, had performed legal services for the plaintiff while the plaintiff was still a resident of Virginia. *Id.* at 7. The plaintiff then moved to Colorado, and the defendant attorney continued to render legal services for her from Virginia. *Id.* The plaintiff sued the attorney in Colorado for malpractice

based on legal services performed in Virginia. The Colorado Supreme Court upheld the exercise of personal jurisdiction in Colorado.

In *Waterval*, the attorney continued to represent the plaintiff after she moved to Colorado for a few years. *Id.* at 10. The attorney derived "monetary benefit" from the relationship. *Id.* Legal services that he performed in Virginia affected the financial interest of the plaintiff, a Colorado resident. *Id.* The attorney directed contacts and correspondence to the plaintiff after her move to Colorado. *Id.* The Colorado Supreme Court concluded that this was sufficient to support personal jurisdiction. *Id.* at 10-11.

Similarly, in this case, the Myers defendants represented Trinity for nearly a decade, derived "monetary benefit" from the relationship, affected the financial interests of Dallas-based Trinity, and directed telephone contacts and correspondence to Trinity in Dallas. In fact, the case for personal jurisdiction here is even stronger than in *Waterval*. In this case, the Myers defendants attended numerous meetings in Texas and actually represented Trinity as its lead trial counsel in a Texas lawsuit for three years. Those contacts were not present in *Waterval*.

Hylwa v. Palka, 823 F.2d 310 (9th Cir. 1987), is similar authority. The plaintiff hired the defendant, a Kansas accountant, then moved to California. *Id.* at 312. The defendant continued to render accounting services to the plaintiff after the move to California. *Id.* He rendered the vast majority of those accounting services in Kansas, traveling into California only a couple of days each year. *Id.* Even though the vast majority of the activities that

constituted the breach of duty occurred outside of the forum state, the Ninth Circuit upheld personal jurisdiction. *Id.* at 314-15.

In *Hylwa*, the Ninth Circuit concluded that the accountant, by contracting to provide accounting services after the plaintiff moved to California, "deliberately created 'continuing obligations' between himself and residents of the forum . . . [and] manifestly has availed himself of the privilege of conducting business there. . . . " *Id.* at 314 (quoting *Burger King*, 471 U.S. at 476). That the accountant rarely came into physical contact with California – and that the plaintiff originally hired the accountant in Kansas – did not defeat jurisdiction. *Id.* Jurisdiction over the Myers defendants is proper just as jurisdiction over the accountant in the *Hylwa* case was proper.

In *Entek Corp. v. Southwest Pipe & Supply*, 683 F. Supp. 1092 (N.D. Tex. 1988), the court implicitly rejected the argument that personal jurisdiction is limited to the forum in which the breach occurred. In *Entek*, the plaintiff, a Texas resident, entered into a distributorship agreement with the nonresident defendants that granted the defendants the right to sell the plaintiff's product in Florida. *Id.* at 1095. The defendants then signed confidentiality agreements in Texas promising not to misappropriate plaintiff's trade secrets. *Id.* Later, the defendants violated their agreements by producing a competing product outside of Texas. *Id.* Notwithstanding that the defendants breached the confidentiality agreement outside of Texas, the court concluded that the defendants' contacts with Texas supported a finding of specific jurisdiction over them. *Id.* at 1095, 1098. A similar result is warranted here.

The Myers defendants' contention that their misdeeds did not cause injury to Trinity in Texas misses the mark. They cite *Southmark Corp. v. Life Investors*, 851 F.2d 763 (5th Cir. 1988), in support of this contention. The *Southmark* court found that a district court in Texas lacked jurisdiction over a Virginia corporation that allegedly interfered with the contractual rights of the plaintiff, a company based in Texas. However, the court was quick to point out that "there is no evidence that the agreement was made or to be performed in Texas or governed by Texas law." *Id.* at 772.

The Tenth Circuit reviewed the effects of intentional tort allegations on personal jurisdiction in *Far West Capital v. Towne*, 46 F.3d 1071, 1077-79 (10th Cir. 1995) (examining *Calder v. Jones*, 465 U.S. 783 (1984), cited by Petitioners in Petition at 21, and its progeny, including *Southmark*). *Far West Capital* reiterates that the agreement at issue in *Southmark* was not made nor to be performed in Texas. *Id.* at 1079. This distinguishes *Southmark* from the case at bar, as the Myers defendants' fiduciary duty was created in Texas and manifested itself in Texas.

The Myers defendants purposefully availed themselves of the benefits and laws of Texas. They purposefully represented Texas-based Trinity, performed activities in Texas pursuant to that representation, received direction from Texas, asked to be admitted to practice before a Texas court, and reaped the financial benefits of the relationship. During this process, the Myers defendants obtained confidences that they have since disclosed to Trinity's competitor, resulting in a lawsuit in Pennsylvania. Petitioners thus purposefully engaged in an extended and continuing relationship with

Texas-based Trinity such that they could have reasonably anticipated being haled into court in Texas for a betrayal of that relationship. *Cf. Hylwa*, 823 F.2d at 314 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

C. Traditional Notions of Fair Play and Substantial Justice

If the two part "minimum contacts" test for personal jurisdiction is satisfied, to escape jurisdiction a defendant must present a "compelling case" that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476-77. Of the factors that the *Burger King* court identified as potentially relevant to this inquiry, only three are applicable here:

- " '[T]he burden on the defendant.' " *Id.* at 477.
- " '[T]he plaintiff's interest in obtaining convenient and effective relief.' " *Id.*
- " '[T]he forum State's interest in adjudicating the dispute.' " *Id.*

The Myers defendants have not sustained their burden of presenting a "compelling case" that the exercise of jurisdiction would be unfair in light of these factors. The first two factors, which involve convenience of the parties, balance one another. It is just as inconvenient for Trinity to litigate in Illinois or Pennsylvania as it is for the Myers defendants to come to Texas. R2 at 20. Trinity filed with its response to the defendants' dismissal motion an

affidavit of its Vice President F. Dean Phelps, Jr. That affidavit establishes that:

- Mr. Phelps will likely be a witness at trial, and trial in Illinois would "greatly inconvenience" him. R2 at 20.
- A Trinity corporate representative will likely attend the trial, and trial in Illinois would "greatly inconvenience the corporate representative." R2 at 20.
- The relevant documents are located in Dallas. R2 at 20.
- A Trinity custodian of records employed at its Dallas headquarters may need to testify. R2 at 21.

Defendants' protestations of inconvenience also lack a certain degree of credibility – Texas is convenient if defendants *represent* a party to a lawsuit, but is inconvenient if *they* are actual *parties* to a lawsuit. In any event, defendants' alleged inconvenience with Texas is not sufficient to render litigating in Texas unfair nor unreasonable. *See Polythane Sys. v. Marina Ventures Int'l*, 993 F.2d 1201, 1206 (5th Cir. 1993).

The third factor – the interest of the forum state – argues strongly for subjecting the Myers defendants to jurisdiction in Texas. Trinity has suffered injury in Texas as a result of their actions. As such, Texas has a "manifest" and "significant" interest in providing a forum for this action. *Burger King*, 471 U.S. at 473; *see also Entek*, 683 F. Supp. at 1098-99 ("[T]he forum state's interest would be served, because Plaintiffs are Texas residents whose business interests have been allegedly damaged.").

In summary, the Myers defendants do not come close to meeting their *Burger King* burden of showing a compelling reason why litigation in Texas would offend traditional notions of fairness. At best, the convenience factors are a wash, whereas the other applicable factor – the interest of the forum state – argues forcefully for personal jurisdiction in Texas.

II. THERE IS NO GOOD REASON TO GRANT A WRIT OF CERTIORARI IN THIS CASE

There are no "special" or "important" reasons for granting a Writ of Certiorari in this case. *See* Sup. Ct. R. 10.1 (1995). The Fifth Circuit's decision does not conflict with any decisions of this Court. The Fifth Circuit applied the legal rules announced by this Court in *Burger King*.

Nor does the Fifth Circuit decision conflict with decisions of other Courts of Appeals. The Myers defendants are wrong in claiming that the Fifth Circuit decision stands in "remarkable contrast," Petition at 15, with the following decisions of the Ninth and Eighth Circuit Courts of Appeals: *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987); and *FDIC v. Malmo*, 939 F.2d 535 (8th Cir. 1991). In fact, these decisions of the Eighth and Ninth Circuits are easily distinguished from the case at bar, and there is no disagreement among the circuits.

In *Malmo*, the only forum contact was a single letter sent by a nonresident attorney to the forum. *Id.* at 536. The *Malmo* court simply applied the well established, noncontroversial rule that "sporadic mail correspondence

alone usually does not constitute 'minimum contacts.' "[1] *Id.* at 537. In *Austad*, the only forum contact was a single trip. In stark contrast with the facts in *Malmo* and *Austad*, here the Myers defendants directed phone calls to Texas, sent bills to Texas, attended numerous meetings in Texas, provided legal services to Trinity while present in Texas, and represented Trinity as its lead trial counsel in a Texas lawsuit, all as part of an ongoing, eight-year attorney-client relationship.

Both the *Sher* and *Austad* cases, cited repeatedly by Petitioners, arose from the representation of a resident plaintiff by a nonresident law firm *in the law firm's forum.* In the case at bar, however, nonresident Petitioners represented Texas-based Trinity *in a Texas lawsuit and in Texas-based interstate matters including patent work. See Sher,* 911 F.2d at 1363 n.3 (finding such a distinction to be significant in a minimum contacts analysis).

In these and other cases cited by Petitioners in Petition at 16, except for the fact that in each of these cases the defendant was either an attorney or law firm, the facts bear little resemblance to those in the case at bar.

- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm represent plaintiff on several matters. *See, e.g., Austad Co. v. Pennie & Edmonds,* 823 F.2d 223, 226 (8th Cir. 1987) (single representation in civil suit); *Biederman v. Schnader, Harrison, Siegal & Lewis,* 765 F. Supp. 1057,

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[1] One judge on the *Malmo* panel dissented, concluding that on the facts of that case a single letter directed to the forum supported personal jurisdiction.

1061 (D. Kan. 1991) (same); *Barnes v. Gerhard*, 834 S.W.2d 902, 903 (Mo. Ct. App. 1992) (same); *Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff*, 446 N.Y.S.2d 447, 449 (N.Y. App. Div. 1981).

- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm represent the plaintiff three years as its lead trial counsel in a lawsuit in the forum state.[2] As with *Sher* and *Austad*, other cases cited by the Myers defendants in Petition at 16 involved representations in the law firm's forum, and not the plaintiff's forum. *See, e.g., Biederman v. Schnader, Harrison, Siegal & Lewis*, 765 F.Supp. 1057, 1059 (D. Kan. 1991) (Pennsylvania law firm represented Kansas resident in Pennsylvania action); *Barnes v. Gerhard*, 834 S.W.2d 902, 903 (Mo. Ct. App. 1992) (Illinois attorney represents Missouri Plaintiff in Illinois lawsuit); *Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff*, 446 N.Y.S.2d 447, 449 (N.Y. App. Div. 1981) (Florida attorney represented New York plaintiff in Florida proceeding).

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[2] In *Hill v. Sidley & Austin*, 762 F. Supp. 931 (S.D. Fla. 1991), the trial court declined to exercise personal jurisdiction over a Chicago law firm even though some of its lawyers had been admitted pro hac vice to practice law in Florida. *Hill* is distinguishable, however, because in that case the pro hac vice representations were for clients other than the plaintiff and were unrelated to the plaintiff's cause of action. By contrast, in this case, the Myers defendants represented Trinity as its lead trial counsel in a Texas lawsuit for three years. This is one of the Texas contacts that created the duty owed to Trinity, the breach of which is the basis for Trinity's cause of action in this lawsuit.

- Unlike this case, in no case cited by the Myers defendants was the resident plaintiff a major client of the nonresident law firm.
- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm choose to foster and cultivate an attorney-client relationship with the resident plaintiff that spanned a decade and resulted in significant profit to the law firm.

CONCLUSION

For the reasons stated above, Trinity prays that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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